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# In the Supreme Court of the United States.

OCTOBER TERM, 1900.

ANDREW H. RUSSELL AND WILLIAM R. Livermore, appellants, *v.* THE UNITED STATES. } No. 242.

APPEAL FROM THE COURT OF CLAIMS.

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

On August 3, 1880, United States Letters Patent No. 230823, were granted to the appellant Russell, for certain improvements in breech-loading guns. In 1882 he submitted three samples of his patented gun, differing from each other in minor details only, to a board of officers convened under the act of February 24, 1881, § 1 (21 Stats., 346, 349), to select a magazine rifle for the United States Army. These guns were tested, but worked with difficulty. The board selected three types of guns, submitted by other parties, for trial in the hands of troops, but no final adoption of any type of gun was made at that time. (Rec.

1; Ho. Ex. Doc. No. 1, 47th Cong., 2d sess., pt. 2, vol. 3, pp. 329 et seq.) On February 4, 1891, the appellant Russell assigned a half interest in his patent to the appellant Livermore, and on January 22, 1892, the appellants again submitted the three above-mentioned guns of their patented type to a board of officers, convened by direction of the Secretary of War for the same purpose as the former board. No test was made of these guns, as they were neither of the caliber desired by the board, nor in proper condition, but the appellant Russell explained their operation to the board. (Report of Chief of Ordnance, 1892, p. 155.) On September 15, 1892, the second board recommended the adoption of a gun submitted by the Krag-Jörgensen Geværkompagni, of Christiania, Norway, and it was provisionally adopted by the War Department as the army rifle. (Rec., 2.)

On November 16, 1892, the appellant Russell, in behalf of both the appellants, wrote to the Chief of Ordnance that they believed that the Krag-Jörgensen gun infringed their patent in certain particulars, and requested that "in considering the allowance to inventors" their "claims for these vital points of construction be regarded." (Rec., 6–7.) In reply the Chief of Ordnance stated:

> * * * The business arrangements with the Krag-Jörgensen Company for the manufacture of this arm have not yet been completed.
>
> On the one hand, that company may agree to indemnify the United States on account of any patent rights granted by the United States

> which may affect the manufacture of the guns, in which case your recourse would be to communicate directly with the company.
>
> On the other hand, should the Government proceed to manufacture the arms without such arrangement, your course will be to bring a suit against the Government in the Court of Claims after the manufacture has progressed. (Rec., 7.)

Russell then wrote, December 9, 1892, that as the Krag-Jörgensen Company had no property in this country there was no practical remedy against it for an infringement, and that he therefore requested a hearing before any business arrangement with the company was closed. (Rec., 7–8.) The Chief of Ordnance replied that the Commissioner of Patents had stated that the Krag-Jörgensen invention had been found to be patentable, but that as other pending applications seemed to be in conflict with it, the patent would not issue until the questions raised were decided. It was therefore suggested that Russell communicate directly with the Commissioner. (Rec., 8.) Russell did so, but the Commissioner replied, on February 14, 1893, that he had no jurisdiction in the matter, as questions of infringement could be determined only by the courts. (Rec., 9.)

On June 7, 1893, the Chief of Ordnance, by authority of the Secretary of War and in his behalf, contracted with the Krag-Jörgensen Company for the right to manufacture an unlimited number of the Krag-Jörgensen guns, for a royalty of $1 per gun. The

contract stated that the company claimed that the Krag-Jörgensen patents fully cover all the mechanism of the gun not open to public use, and provided that a bond should be given to protect and defend the United States against all suits and claims on account of infringement of inventions in the manufacture of these guns. (Rec., 14–16.) On June 30, 1893, Russell wrote to the Chief of Ordnance informing him of what the Commissioner of Patents had written on February 14, 1893, adding that the construction of the Krag-Jörgensen gun infringed the appellants' patent, although the Krag-Jörgensen patents did not. (Rec., 9.) The Chief of Ordnance then asked Russell for a written statement of his case, adding that the Krag-Jörgensen Company were required to guarantee the United States against all damages for infringement. Russell then stated his case in writing, pointing out the particular matters as to which he claimed that the appellants' patent was infringed by the Krag-Jörgensen gun. (Rec., 10–13.) The Chief of Ordnance replied on December 1, 1893, stating that the Ordnance Office could not determine the case, and calling Russell's attention to the following clause in the contract of June 7, 1893:

> The said party of the first part shall indemnify the United States and all persons acting under them for all liability on account of any patent rights granted by the United States which may affect the right to manufacture herein contracted for.

The same letter continued as follows:

> You have requested that a copy of your communication and a copy of your patent should be forwarded by this office to the company, and for that purpose you have forwarded duplicates of your letter and of the patent specifications. It is considered best that you should forward these communications direct; they are, therefore, returned to you for the purpose. (Rec., 14.)

On September 18, 1897, the appellants filed their petition in the Court of Claims, and later an amended petition, setting up the facts above stated. On demurrer the amended petition was dismissed February 26, 1900, whereupon this appeal was taken. (Rec., 1, 19, 20.)

## BRIEF OF ARGUMENT.

As far as concerns the form of the pleadings, the only difference between the present case and that of *Schillinger* v. *United States* (155 U. S., 163) is that in the latter case the petition set up, in terms, a "wrongful appropriation" of a patented invention by the United States, whereas here the petition sets up certain facts, including the correspondence between the parties, and then states that a contract "is to be implied from the use by the United States of the claimants' said patented invention, as hereinbefore related." While such argumentative pleading would have been bad at common law, it complies with rule 16 of the Court of Claims, providing that "if [the claim] be founded upon an implied contract, the facts upon

which the claimant relies to prove a contract must be specified." The object of this rule is obviously to enable the court to see whether or not a contract can be implied from the facts alleged, in case they are proved, and the argumentative allegation that a contract is to be implied might really as well be omitted, except for its possible use in directing the court's attention to the fact that the suit is brought upon the theory of an implied contract and nothing else.

At all events, the allegation of an implied contract is purely argumentative, and in no way prevents either the defendant from demurring on the ground that the facts are not such as to warrant the implication of a contract, or the court from considering the allegations of fact and deciding whether or not a contract can really be implied from them. In the present case the court below has decided that a contract can not be implied.

The difference between the present case and the *Schillinger* case as to the form of the pleadings is, however, unimportant, because the decision in the *Schillinger* case was not based upon the circumstance that the petition set up, in express terms, a "wrongful appropriation" of the claimants' patented invention, but upon the much more important circumstance that "the transaction as stated in the petition, and as disclosed by the findings of the court, was a tort pure and simple." In other words, had the petition in the *Schillinger* case merely recited the facts, concluding with an averment that a contract was to be implied from those

facts, and had the same facts appeared in the findings of the court below, the decision would have been just the same. The gist of the decision was that the case was essentially a case "sounding in tort," and not that the claimant had undertaken to sue in tort instead of in contract. Hence, if in the present case the court below was right in holding that the facts alleged in the petition show that the transaction was a tort, the mere fact that the appellants have attempted to sue in contract will not prevent the *Schillinger* case from being a conclusive authority against them.

It is submitted that the statements of fact in the amended petition do not warrant the implication of any contract between the appellants and the appellee. A contract involves an offer and an acceptance. If the submission of the appellants' gun to the board of officers in 1882 constituted on offer, there was certainly no acceptance, for the board's report was wholly adverse to the gun submitted. Three samples of this gun appear to have been submitted, differing from each other in minor details only. As to the first, called No. 14, the report is as follows:

> Four hundred shots were fired; 33 missfires; 6 failures to eject. After firing 100 shots the exhibitor was permitted to replace the ejector with a new one. In the fourth 50 of shots the bolt twice pulled entirely out to the rear in opening, caused by the sear spring failing to press the sear into the notch. After 400 shots the gun worked with great difficulty, and on inspection was decided to have broken down, and was withdrawn.

As to the second gun, called No. 17, the report is as follows:

> This was the same gun as No. 14, with some slight modifications. * * * Five hundred shots were fired. Thirty-nine missfires during the test, some of which required several pulls of the firing pin to explode the primer. * * * Gun opened and worked with difficulty, requiring the use of the mallet. After opening, the cap to the magazine would not at first spring back to its place; 5 missfires. * * * Extractor broken and head of shell blown nearly off, and shell taken out by use of bullet and rammer.

As to the third gun, called No. 40, the report is as follows:

> The Russell gun, No. 17, having been modified as explained below, was reentered as No. 40. * * * Five hundred shots were fired. * * * Gun thoroughly rusted. Opened with great difficulty, requiring the use of mallet and water, after which could not be made to operate without cleaning up and repairing, and the tests were abandoned.

The final recommendation of the board was that a number of the Lee, Chaffee-Reece, and Hotchkiss guns be purchased for trial in the hands of troops, these three being the only guns which met the tests preestablished by the board. As the appellants were present and were given an opportunity to test their gun themselves, it can not be doubted that the tests were fair, and that the gun was rejected on its merits. (See House Ex. Doc. No. 1,

Forty-seventh Congress, second session, Ordnance, part 2, vol. 3, pp. 329 *et seq.*)

Similarly, if the submission of the appellants' gun to the board of officers in 1893 constituted an offer, there was certainly no acceptance, for the board's action involved a second rejection of the gun. The three guns of 1882 were again presented, and the report is as follows:

> Capt. A. H. Russell, Ordnance Department, appeared before the board and submitted three guns of his invention. As, however, they were not of caliber .30, but of caliber .45, and not in condition for firing, no tests could be made, Captain Russell merely explaining their mechanism to the board. (Rept. of the Chief of Ordnance, 1892, p. 155.)

In view of the repeated rejection and condemnation of the appellants' gun by the boards of officers to whom it was submitted, it is difficult to see why this submission and testing of the gun should have been referred to at all in a petition setting up an implied contract, in the absence of any allegation that the conclusions of these boards were subsequently withdrawn or modified. As far as the action of these boards go, they show not merely a failure to do anything which could be construed into a contract with the appellants, but even a positive refusal to contract with them for the use of their gun.

The facts which the petition seems to rely on most strongly as constituting a contract are the appellant Russell's letter of November 16, 1892 (Exh. A, Rec.,

6–7), the reply thereto (Exh. B, Rec., 7), and the subsequent correspondence (Exhs. C to K, Rec., 7–14), coupled with the Krag-Jörgensen contract and bond and the manufacture of the rifles. It is hard to see how the letter of November 16, 1892, can be regarded as an offer to contract, since it is merely a notice that the Krag-Jörgensen gun "infringes" the appellants' patent, and a request that, in considering the allowance to inventors, the appellants' "claims for these vital points of construction be regarded." While the language of this letter is, perhaps, a little obscure, the most reasonable construction to give to it is that it was intended, in the first place, to notify the Chief of Ordnance that the gun submitted by the Krag-Jörgensen Company, and recently adopted by the War Department, infringed the appellants' patent, so that the proposed manufacture of guns of this type by the United States would infringe that patent; and, secondly, to request that the claims which the appellants would have for compensation on account of such infringement should be regarded. The word "claims" can not refer to claims on account of a contractual use of the appellants' invention, for no contract is mentioned or even suggested. The letter refers only to an alleged infringement by the Krag-Jörgensen Company, and, by direct inference, to an expected infringement by the United States, and hence the "claims" must be understood to be those which would result from such expected infringement. A warning that a certain course of action will be a tortious violation of a person's rights, coupled

with a request that the claims which will result in consequence of such tort shall be considered and compensated for when they arise, is not and can not be the same thing as an offer to enter into a contract.

Whatever be thought of the letter of November 16, 1892, the Ordnance Office reply of November 18, 1892 (Exh. B), has certainly none of the elements of the acceptance of an offer to contract. While this letter does not contain the word "infringement," yet, as the letter to which it was a reply referred solely to the matter of infringement, the former must be understood as referring to the same thing. The letter states that in case the Krag-Jörgensen Company agrees (as it eventually did) to indemnify the United States on account of any patent rights which may affect the manufacture of the guns, the claimants' recourse would be to communicate with the company, while if there should be no such arrangement for indemnity the appellants could sue the United States after manufacture had progressed. It is true that the bond eventually given is one upon which the appellants can not sue, and also that whatever rights of suit the appellants may have can not be limited to such as the Ordnance Office may inform them that they have; but it is equally true that the only right of suit referred to in this letter—especially if taken in connection with that to which it was an answer—was the right to sue for an infringement, not the right to sue upon a contract.

It is immaterial that, as a matter of law, the United States can not be sued for an infringement, that being

a tort. When the letter in question was written, and until November, 1894, when *Schillinger* v. *United States* (155 U. S., 163) was decided, it was believed that as patents were granted in pursuance of the Constitution and of acts of Congress, a claim for an infringement was based upon the Constitution and upon acts of Congress, and hence came within the jurisdiction of the Court of Claims. Apart from this, though, the important matter is not whether the Ordnance Office was right in its understanding of the law, but *what it understood* in regard to the subject-matter of this letter.

This letter of the Ordnance Office, then, is simply an admission that if it infringes the appellants' patent, thereby committing a tort against them, the appellants can sue the Government. It is not, and can not have been intended as, an acceptance of an offer to contract.

If there could be any doubt as to the position in which the appellants and the Ordnance Office stood as regards each other in this matter when the letter of November 16 and the reply of November 18 were written and received, it would be set at rest by the subsequent correspondence between the parties (all of which is made a part of the petition), wherein an infringement is always the thing referred to, and never a contract. The material portions of this correspondence are as follows:

> Exhibit C (Rec., 7–8). Russell to Chief of Ordnance, December 9, 1892: "I desire to say that I could practically have no remedy *for infringement* of my patent against the Krag-Jörgensen

Company, as they have not, that I am aware of, any property in this country."

Exhibit E (Rec., 8–9). Russell to Commissioner of Patents, February 6, 1893: "I presented to the Ordnance Office the claim that the gun recommended for adoption by the United States Army, known as the Krag-Jörgensen gun, *infringed* claims 22, 28, and 29 of my patent, No. 230823."

Exhibit F (Rec., 9). Commissioner of Patents to Russell, February 14, 1893: "Questions of *infringement* can be determined only by the courts."

Exhibit G (Rec., 9). Russell to Chief of Ordnance, June 30, 1893: "In reference to correspondence regarding *infringement* of my patent, No. 230823, by the manufacture of the Krag-Jörgensen magazine rifle recommended by the magazine gun board. * * * The patent *infringed* is one of long standing, and no claim is made that the Krag-Jörgensen patents infringe, but it is claimed that the construction of the gun embodying those patents *does infringe* my patent of 1880."

Exhibit H (Rec., 10). Acting Chief of Ordnance to Russell, July 7, 1893: "The agreement with the Krag-Jörgensen people is such that they are required to guarantee the United States against all damages for *infringement*."

Exhibit I (Rec., 10–14). Russell to Chief of Ordnance, November 22, 1893: "My belief is sustained by expert opinion that the Krag-Jörgensen gun under construction at Springfield *infringes* the twenty-second claim of my patent. * * *

> "I therefore feel warranted in the belief that my claim 28 covers the Krag-Jörgensen construction and is *infringed* thereby. * * *
>
> "I therefore base my claim for compensation on the *infringement* of my claims 22 and 28, and the probable *infringement* of claim 29, in my patent No. 230823. * * *
>
> "My first office notice to the Ordnance Department of this *infringement* is dated November 16, 1892."

The appellants' brief, page 16, contains, however, this statement in regard to this use of the words "infringed" and "infringement:"

> In each instance where one of these words is found it was used to describe the rifle manufactured by the Krag-Jörgensen Gevaerkompagni and presented to the board of 1892. No such term was applied to the prospective use of the claimants' invention by the United States.

It is submitted that out of all the letters in question the only ones which bear out this statement are Exhibits E and F, the letters to and from the Commissioner of Patents, which are of no importance. The words of Russell's first letter, Exhibit A, are, "infringed in the construction of the Krag-Jörgensen magazine gun, lately adopted by the War Department." What the War Department had adopted was not the individual guns sent over by the Krag-Jörgensen Company, but the type of gun. Russell's letter means nothing else than that all guns of this type, wherever and by whomsoever manufactured, infringe the appellants' patent, and hence that as the United States pro-

posed to manufacture such guns, such manufacture would constitute an infringement.

The other communications likewise refer in unmistakable terms to an infringement by the Government. In Exhibit C, Russell wrote: "I could practically have no remedy for infringement of my patent against the Krag-Jörgensen Company." He was evidently not referring to such a trifling matter as that the company had brought into the United States a few guns which he believed infringed his patent. It would never have occurred to him to proceed against the company for that. What he meant, and the only thing that he could possibly have meant, was that when the Government proceeded to manufacture guns of that type he would have no practical remedy against the Krag-Jörgensen Company for the infringement involved in such manufacture by the United States. That would be a serious matter, as the number of such guns would be great, and that would be the infringement for which he wished a remedy.

So in Exhibit D, where the Chief of Ordnance referred to "the subject of infringement of your patent in the manufacture of the Krag-Jörgensen magazine firearm," there can be no question as to what manufacture was meant. It was the Government's manufacture, and nothing else.

Exhibits G, H, and I all refer to this same matter of an infringement by the Government. In Exhibit I Russell was particularly explicit on this point, saying:

> I hereby respectfully state my position with regard to the Krag-Jörgensen rifle construc-

> tion recently adopted for the U. S. Army, and *now in process of manufacture at the Springfield armory.* * * * My belief is sustained by expert opinion that the Krag-Jörgensen gun *under construction at Springfield* infringes the 22d claim of my patent. (Rec., 10, 12.)

In view of such statements as these, it is going rather far for the appellants to now contend that they never spoke of the manufacture of the Krag-Jörgensen gun by the United States as an infringement, or that, even if they did so speak of it, they can now treat it as having been carried on under an implied contract all the time. In fact, the former contention must be passed by as too unreasonable to warrant further discussion, and the latter contention need alone be considered. This contention involves the admission that when they used the words "infringe" and "infringement" so repeatedly they did not know the purport of these words, and that what they really meant all the time was that the manufacture of the Krag-Jörgensen gun would raise a contract to pay them a royalty upon their patent; or, in other words, that while the language which they used all along purported to relate to a demand for compensation for a tort, it really concerned an offer to contract. This is certainly an astounding admission for grown men to make.

Even if the appellants could be heard to say, in effect, that in using the word "infringement" they did not really mean an infringement, it still would not follow that the officers of the Ordnance Office were equally

careless in their use of language, or that they intended, when writing about an infringement, to enter into any relations with the appellants from which a contract could be implied. The petition does not allege that the ordnance officers used the word "infringement" in the sense of "contractual use," and, in the absence of proof that they did, it must be conclusively presumed that when they said "infringement" they meant an infringement, and nothing else.

In this connection it is well to notice the language used by this court in an action against a Government officer for an infringement:

> The United States, by successive acts of Congress, have consented to be sued upon their contracts. * * * The United States may accordingly be sued by a patentee for their use of his invention under *a contract made with him* by the United States or by their authorized officers. *United States* v. *Burns*, 12 Wall., 246; *United States* v. *Palmer*, 128 U. S., 262; *United States* v. *Berdan Co.*, 156 U. S., 552.
>
> But the United States have not consented to be liable to suits, founded in tort, for wrongs done by their officers, though in the discharge of their official duties. * * * The United States, therefore, are not liable to a suit for an infringement of a patent, that being an action sounding in tort. *Schillinger* v. *United States*, 155 U. S., 163; *United States* v. *Berdan Co.*, 156 U. S., 552. (*Belknap* v. *Schild*, 161 U. S., 10.)

The opinion just quoted from is important, not merely as a reaffirmance of the doctrine of *Schillinger* v. *United*

*States*, but as containing an explicit statement of what was decided in *United States* v. *Berdan Co.*, viz, that a contract *had been made* between the parties. The opinion in that case uses the following language in regard to the contract:

> Berdan, as an officer of the plaintiffs herein, assignees of his inventions during the period covered by this action, was in constant communication with the ordnance officers, requesting the use of his devices by the Government. They knew him as an inventor, and knew his inventions as soon as they were patented. * * * Plaintiffs have desired the Government should use their patented devices, and have also desired and requested compensation for such use. So far, then, as the petitioner is concerned, the use of this invention was with its consent, in accordance with its wish, and with the thought of compensation therefor.
>
> While the findings are not so specific and emphatic as to the assent of the Government to the terms of any contract, yet we think they are sufficient. There was certainly no denial of the patentee's rights to the invention; no assertion on the part of the Government that the patent was wrongfully issued; no claim of a right to use the invention regardless of the patent; no disregard of all claims of the patentee, and no use in spite of protest or remonstrance. Negatively, at least, the findings are clear. The Government used the invention with the consent and express permission of the owner, and it did not, while so using it, repudiate the title of such owner. (156 U. S., 567–568.)

The opinion then went on to quote the findings in regard to the then noncommittal policy of the War Department toward inventors, the Chief of Ordnance's statement that if any of the features of Berdan's patent should be used in the manufacture of the Government's gun he expected to recommend payment, the understanding of a subsequent Chief of Ordnance that the Springfield extractor-ejector was the mechanical equivalent of the device of Berdan, who would have to be paid if his patent was valid and was used, and the subsequent manufacture of the Springfield gun, with this understanding, and "with the expectation that if the court sustained a claim by Berdan against the Government upon his patent No. 88436, then the Government must pay him for the use of the invention." The import of these findings was said to be this:

> That the officers of the Government, charged specially with the duty of superintending the manufacture of the muskets, regarded Berdan as the inventor of this extractor-ejector; that the difference between the spiral spring and the flat spring was an immaterial difference; that, therefore, they were using in the Springfield musket Berdan's invention; that they used it with his permission as well as that of his assignee, the petitioner, and that they used it with the understanding that the Government would pay for such use as for other property which it might take, and this, although they did not believe themselves to have the authority to agree upon the price. (156 U. S., 569).

The above facts were held to show the existence of

"a contract to which both parties assented," or, to quote the language of *Belknap* v. *Schild* (*supra*), "a contract made with [the patentee] by the United States:" but these facts differ widely from those found in the present case. The present petition sets up no request by the appellants that the Government, which had twice rejected their gun as a whole, should use some part of it in connection with another device which had been adopted, but merely a warning that the manufacture of the adopted gun would constitute an infringement. So far as the appellants are concerned, the alleged use of their device appears to have been without their consent, not in accordance with their wish, though with the desire on their part for compensation for the alleged tortious infringement.

As concerns the appellee's position, the dissimilarity between the two cases is even more clearly shown. The former noncommittal attitude* of the War Department toward inventors (an attitude due apparently to the fact, pointed out by this court, that the officers "did not believe themselves to have the authority to agree upon the price") had ceased to exist, as is conclusively shown by the fact that the Department did admit the legal rights of Messrs. Krag and Jörgensen as inventors, and did decide upon their claims against the Government, by making an express contract with their assignee for the right to manufacture on payment

*It should not be overlooked that this noncommittal attitude, now manifestly a thing of the past, is a matter of fact, not of law. It is not alleged in the petition, and hence is not one of the facts which are before the court.

of a fixed rate of royalty. There was no hesitation about dealing directly with inventors or their assignees, or passing upon the money value of inventions, or agreeing to pay a price. There was no recognition whatever of even the possible identity of any part of the appellants' device with any part of the Krag-Jörgensen gun, nothing whatever to correspond to General Benét's understanding, in the Berdan case, that the device used was "seemingly identical, certainly the mechanical equivalent" of that patented to Berdan. Lastly, there was no such understanding, on the part of the officers of the Government, that the Government would pay the present appellants for the use of their invention, as was found to have existed in the Berdan case.

What the present petition sets up, as regards the acts of the appellee, is the original statement that if the Krag-Jörgensen Company agreed to be responsible for infringements the appellants could sue them, and if not, then they could sue the United States, followed by the later statement that the Krag-Jörgensen Company had so agreed, coupled with a suggestion that the appellants furnish the Ordnance Office with a statement of the case for future reference, and the final statement that the case "can not be determined by the Ordnance Department." There is no suggestion of a contract in these statements of the ordnance officers.

Had the ordnance officers been the owners of a gun factory or the officers of a firearms manufacturing

company, it could not possibly have been contended that in doing and saying what they are alleged to have said and done they had contracted with the appellants; and this court has laid it down that Congress "has limited the jurisdiction of the Court of Claims to cases arising out of contracts expressed or implied—contracts to which the United States is a party *in the same sense that an individual might be*, and to which the ordinary principles of contracts must and should apply." (*Smoot's Case*, 15 Wall., 36, 45.) Under that decision it is clear that if the present petition, supposing it to be filed against a firearms manufacturing company, would not be held to set up a cause of action sounding in contract, the mere fact that it is filed against the United States can not alter the nature of the action. "An implied contract is founded upon a presumed agreement" (*Simpson* v. *United States*, 31 C. Cls. R., 217, 245), but in the present case, as in that of Schillinger, "there was no point in the whole transaction from its commencement to its close where the minds of the parties met or where there was anything in the semblance of an agreement." (*Schillinger* v. *United States*, 155 U. S., 163, 170.)

In *Coston* v. *United States* (33 C. Cls R., 438, 447) the Court of Claims said:

> The petition sets forth alleged dealings at various times with the Department of the Navy in relation to these signals, * * * but it does not state an admission at any time by defendants that they were using the device

covered by the Coston patent here under consideration. The petition therefore could be properly dismissed upon demurrer.

In the present case the petition has the same defect that would have been held fatal in the Coston case, had a demurrer been based upon it. The present petition does, it is true, allege, as a matter of deduction from the facts stated, that a contract is to be implied, "whereby the United States agreed to pay to the claimants reasonable compensation," etc., but it is precisely this alleged agreement the legal existence of which is called in question by this demurrer. Except as a matter of deduction, there is no allegation of an admission by the United States that it was using, or might possibly be using, the appellants' device. The furthest that the facts go in this direction is to show a statement that if the appellants believed their patent to be *infringed* they could sue for such infringement, but that the appellants were, or might be, justified in such a belief was in no way admitted by the officers of the Government.

The appellants' brief starts out with the proposition that the officers of the United States must be understood to have agreed to allow the appellants "such reasonable compensation as might become due them for the use which it [the United States] made of their property," because the only other theory which appellants' counsel can see in the case is the untenable one "that the military invited inventors to present their devices with the intention of defrauding or injuring" the persons who did so. The case involves no such

dilemma, however. Undoubtedly the inventors who submitted their guns in 1882 and 1892 were entitled to expect that any person or persons whose gun was adopted would receive compensation, but the appellants' gun never was adopted. On the contrary, it was rejected. If any patented portion of its design has actually been used in the gun which was adopted, the Government officers have never admitted that this has been done, and it can not possibly be contended that it was done intentionally or knowingly. The Government did not seek to incorporate into the design of the gun which it adopted a single feature of any of the numerous guns of other designs which were submitted to it. It simply adopted one single type of gun which had been submitted to it as a complete whole, and which those who offered it declared was not covered as to any feature by any other patents than their own. The fact that a bond was given for the Government's protection against claims on account of the patents of other parties does not mean that the Government did not rely, and rely confidently, upon the declaration of the Krag-Jörgensen Company, but merely that it was realized that in this, as in every other human declaration, there was a possibility of error. The officers of the Government have never said to the appellants, "If we are using any part of your patented invention, we will pay you," nor can anything which they wrote or did be tortured into such a promise. What they said was that if the appellants believed that their patent would be *infringed* by the

manufacture of guns of the Krag-Jörgensen type, and there should be no remedy against the Krag-Jörgensen Company, their course would be "to bring a suit" (i. e., a suit for such infringement) "against the Government in the Court of Claims after manufacture has progressed." This is no acceptance of a contract.

The appellants' brief seeks to bring the present case within the doctrine of *McKeever* v. *United States* (14 C. Cls. R., 396, affirmed without opinion), but the facts of the two cases are wholly dissimilar. McKeever's patented device was submitted to a board, and was adopted with full knowledge of all the facts. That such a device would have to be paid for was just as evident as that the Krag-Jörgensen gun, when adopted and manufactured, would have had to be paid for, even if there had been no express contract. When the Court of Claims, in *Kelton* v. *United States* (32 C. Cls. R., 314, 341), said that McKeever had "recovered for what, as between individuals, would be an infringement of his patented device," all that was meant was that, as between individuals, any making of a patented invention, not under an express contract, constituted an infringement, and that a recovery could be had for it as such; or, in other words, that even if an individual intends and agrees to pay a reasonable royalty, he can be sued for an infringement, if no express contract has been entered into, but the Government must be sued upon its intention and agreement. Had the Court of Claims meant more than this, it would have violated the doctrine of *Smoot's Case*, already cited.

In *Butler* v. *United States* (23 C. Cls. R., 335, not appealed) the statement of facts is meagre, but it is to be inferred from the opinion that the statement in the petition that the "patentees and assignees offered the use of said improvement to the United States, which offer the United States, after careful investigation, accepted," was not disputed by the defendant. The opinion expressly states that "the only question of law involved in the case is as to the running of the statute of limitations." The court below has obviously held that its decision in that case furnished no precedent for a case like the present, where the appellee denies that it has accepted any offer made by the appellants.

It is therefore submitted that the judgment of the court below should be affirmed.

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